it follows that there should be a similar freedom from liability where misdelivery is to one who is reasonably believed to be an agent. In the instant case there was no evidence that the defendant depositary acted unreasonably under the customary method of conducting the business in question. It is therefore submitted that the decision is unsound.

THE EFFECT OF MOTIONS BY BOTH PARTIES FOR DIRECTED VERDICTS ON THE RIGHT TO A JURY TRIAL.—In *Mansha* v. *San Benito Land Co.* (Iowa 1921) 184 N. W. 345, the Supreme Court of Iowa held that though both parties moved for a directed verdict, there was no waiver of the jury trial of the issues of fact. But in *Superior Steel Spring Co.* v. *New Era Spring & Specialty Co.* (Mich. 1921) 184 N. W. 440, a contrary result was reached.[1] Many courts that apply the rule of the latter case assume that both parties by moving for a peremptory instruction thereby concede that there is no dispute as to the facts, and that there is no issue to submit to the jury.[2] Such assumption was the basis of the adoption of the rule by the Supreme Court of the United States in *Beuttell* v. *Magone*,[3] and of the reaffirmation thereof as recently as 1919 in *Williams* v. *Vreeland*.[4] Perhaps the majority of the courts which have enunciated the rule place it squarely upon the ground that the parties by making mutual motions thereby evidence an intention to waive the jury and are precluded on appeal from objecting that disputed questions of fact were decided by the court unless at some time before judgment the appellant either expressly or by conduct negatived such intent.[5] It is submitted, however, that neither the assumption of undisputed facts nor that of an intention to waive the jury is justified.

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[1] Both courts are supported by previous decisions in their respective jurisdictions. *German Savings Bk.* v. *Bates* (1900) 111 Iowa 432, 82 N. W. 1005; *Burton* v. *Ladd* (1920) 211 Mich. 382, 178 N. W. 774. And also by authority in other jurisdictions. *The Second Nat. Bk. of Hoboken* v. *Smith* (1918) 91 N. J. L. 531, 103 Atl. 862 (issue of fact nevertheless goes to jury); *Bankers' Surety Co.* v. *William Miller & Sons Co.* (1912) 105 Ark. 697, 150 S. W. 570 (court passes on issues of fact). The Michigan court, however, appears to have overlooked its contrary holding in *Lonier* v. *Ann Arbor Savings Bk.* (1908) 153 Mich. 253, 116 N. W. 1088, and to have perhaps misinterpreted the decisions in *St. Mary's Power Co.* v. *Water-Power Co.* (1903) 133 Mich. 470, 95 N. W. 554. and *Wolverine Farms Co.* v. *De Young* (1914) 182 Mich. 200, 148 N. W. 395. upon which it relied. The last two are said by the appellate court to be cases where the parties had acquiesced in an announcement by the trial judge that he understood a jury trial had been waived. But in fact the trial judge in the *Wolverine* case only said that, "both parties asked for a direction of a verdict," and in the *Power* case that "both parties seemed to agree that it is the duty of the court to direct a verdict in this case; the plaintiff insisting that it is the duty of the court to direct a verdict in his favor; and the defendants claim that it is the duty of the court to direct a verdict in their favor . . . ." From acquiescence in such language it is hard to understand how the appellate court could construe express or implied acquiescence in a waiver of a jury trial. The appellate court seems rather, despite its language, to hold that such motions presumptively waive a jury trial. The court in the instant case, therefore, is not totally unjustified in relying upon the *Wolverine* and *Power* cases.

[2] *Cf. Winchell* v. *Hicks* (1859) 18 N. Y. 558; *Lewis* v. *Jackson* (App. Div. 1921) 191 N. Y. Supp. 806 (*semble*).

[3] (1895) 157 U. S. 154, 157, 15 Sup. Ct. 566. The rule as laid down in this case was dictum, but it has been consistently followed by the federal courts.

[4] (1919) 250 U. S. 295, 39 Sup. Ct. 438.

[5] *Southern Pacific Co.* v. *United States* (C. C. A. 1915) 222 Fed. 46; *Schultes* v. *Sickles* (1895) 147 N. Y. 704, 41 N. E. 574; *Eastern D. P. Dye Works* v. *Travelers' Ins. Co.* (App. Div. 1921) 190 N. Y. Supp. 822 (conduct).

Where the facts are conceded,[6] or where the party having the burden of going forward with the evidence introduces no further evidence, the court may direct a verdict,[7] and this is proper whether both parties moved for a directed verdict, or only one of them, or if neither of them so moved. But where such party does introduce further evidence, the court may still be called upon to decide whether there is sufficient evidence to make an issue for the jury. The method of requesting the court to decide this preliminary question is to move for a directed verdict or nonsuit. Assume a case where there is an issue to submit to the jury: a motion to direct made by either the plaintiff or defendant would have to be refused. Is the case any different merely because both parties happen to make the motion? It is in just such a case that the federal courts say there is no dispute as to the facts. In reality the parties instead of agreeing on the facts are asserting exact opposites.[8] The proponent of each motion is asserting that upon the evidence the jury could not reasonably fail to find for him. To say there is no dispute as to the facts is simply the assertion of that which is not so.[9] The rule, therefore, is unsound unless it can be justified upon the theory of a waiver of the jury.

There is no doubt that in civil cases the parties may waive a jury and leave the determination of the facts as well as the law to the court. To presume an intent so to waive, from the fact that the parties moved for a directed verdict, is to presume that the parties intended to relinquish something for nothing. If in such a case the motion of A be denied, the above presumption results in the court's deciding the case for B; whereas, if there were no such presumption, the court would have to submit the case to the jury, and A would at least have the chance of obtaining a favorable verdict. Furthermore, it should be noted that even though A is entitled to a directed verdict, he may not get it unless he moves therefor. If he does not so move, the case may be submitted to the jury. In the event of a verdict against him, his only redress is a motion for a new trial. If this be denied, at common law there is no review in the appellate court.[10] Therefore, both to entitle him to appellate review and in the proper case to insure the prevention of a needless jury trial, he must move for a directed verdict. So it seems unreasonable to assume that the parties intended to waive the jury merely because they asked for a ruling the request for which was necessary to safeguard their interests. The courts applying the rule, evidently realizing the harsh consequences that would result from treating mutual motions as an absolute waiver, have rendered the rule more or less impotent by regarding it as a mere presumption of a waiver which is overcome if at any time before judgment the party whose motion is denied expressly requests that the case

[6] By "facts" are meant the ultimate facts. Though there may be no conflict as to the evidential facts, there may still be as to the ultimate facts.

[7] In some jurisdictions the court may not direct for the party having the burden of establishing. The question of when a verdict should be directed is discussed in (1922) 22 COLUMBIA LAW REV. 256.

[8] *Broadhurst* v. *Hill* (1912) 137 Ga. 833, 74 S. E. 422; *Hayes* v. *Kluge* (1914) 86 N. J. L. 657, 92 Atl. 358; *Stauff* v. *Bingenheimer* (1905) 94 Minn. 309, 102 N. W. 694.

[9] The assumption of undisputed facts probably arose from confusing a demurrer to the evidence with a motion to direct a verdict. For a discussion of the differences between demurrers to the evidenc and motions for dircted verdicts, see *Slocum* v. *New York L. Ins. Co.* (1913) 228 U. S. 364, 395, 33 Sup. Ct. 523.

[10] The common law rule was that there was no review in the appellate court of the trial court's ruling on a motion for a new trial. This rule still obtains in the federal courts, *Terre Haute & Indiana R. R.* v. *Struble* (1883) 109 U. S. 381, 3 Sup. Ct. 270, although it has been changed by statute in many jurisdictions, and to-day in those states the appellate court can review the trial court's ruling on a motion for a new trial. *E. g.*, N. Y. Civ. Prac. Act § 609(2).

be submitted to the jury,[11] or impliedly makes such request by accompanying the motion with a request for instruction,[12] or by other conduct which negatives the idea of waiver.[13] In view of the fact that the rule may be avoided in every case, it would seem that it is without utility in the trial of cases while it may result in depriving a litigant of his constitutional right to a jury trial because of the incompetence or ignorance of counsel.

EXERCISE OF THE POWER OF EQUITY TO ENJOIN PROCEEDINGS IN ANOTHER STATE.*—It is well settled that the courts of one state have the power, in a proper case, to restrain a citizen of that state from prosecuting a suit against another citizen in the courts of a sister state.[1] The opinions say that the decree operates *in personam* and is in nowise an interference with the proceedings of the court in the sister state.[2] The question, what constitutes a proper case for the exercise of such power, however, has never been adequately answered, and the result is a confusion of conflicting decisions.

In the absence of equitable considerations the general rule is that where suit may be brought in either of two tribunals, that court which first obtains jurisdiction of the case retains it; and this extends, upon principles of comity, to cases of conflicting suits brought in the courts of sister states.[3] The power of injunction, therefore, should not be exercised capriciously, nor merely to compel litigants to use the courts of their own state, nor even because the petitioner has good reason to apprehend a less favorable result for himself in the foreign court.[4]

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[11] See cases *supra*, footnote 5.

[12] *Cf. Empire State Cattle Co.* v. *Atchison, etc. Ry.* (1907) 210 U. S. 1, 28 Sup. Ct. 607.

[13] *Eastern D. P. Dye Works* v. *Travelers Ins. Co., supra*, footnote 5. Although it is said that mutual motions amount to a waiver of a jury trial, it has been held that it is not error to submit a case to the jury notwithstanding the fact that such motions were unaccompanied by an express or implied negation of the waiver. *Lake Superior Iron Co.* v. *Drexel* (1882) 90 N. Y. 87. The assumption of no dispute of facts or of a waiver, therefore, seems unsound.

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* The scope of this note is limited to the case where both parties are residents of the state in which an injunction is sought. Where one or both of the parties are not so resident, questions of power and not merely those of exercise, are involved.

[1] *Culp* v. *Butler* (Ind. 1919) 122 N. E. 684; *Wabash Ry.* v. *Peterson* (Iowa 1919) 175 N. W. 523; *Reed's Adm'x* v. *Illinois Cent. R. R.* (1918) 182 Ky. 455, 206 S. W. 794; *Standard Roller Bearing Co.* v. *Crucible Steel Co.* (1906) 71 N. J. Eq. 61, 63 Atl. 546; *Claflin* v. *Hamlin* (N. Y. 1881) 62 How. Pr. 284.

It is now settled beyond controversy that the exercise of this power does not offend the Federal Constitution, especially §§ 1 and 2 of Article 4, guaranteeing full faith and credit in each state to the judicial proceedings of the several states and equality of privileges and immunities for their citizens. *Cole* v. *Cunningham* (1890) 133 U. S. 107, 10 Sup. Ct. 269.

[2] See cases *supra*, footnote 1.

In fact, however, the court in *Wilson* v. *Joseph* (1886) 107 Ind. 490, 491, 8 N. E. 616, seems correct in saying that the "subject matter . . . is . . . ultimately but indirectly affected." For if, in some manner, the enjoined suit were prosecuted to judgment, the plaintiff therein would not only be liable for contempt, but it is submitted that where equitable defenses are permitted, the injunction would be a defense to a subsequent action on the judgment. *Dobson* v. *Pearce* (1854) 12 N. Y. 156; see (1915) 15 COLUMBIA LAW REV. 228, 247 *et seq.*

[3] "Not only comity but public policy . . . requires courts should refrain from exercising their powers under such circumstances that they may be brought into collision with each other, and the rights of suitors lost sight of in a useless struggle." See *Harrington* v. *Libby* (N. Y. 1875) 6 Daly 259, 264.

[4] *Royal League* v. *Kavanagh* (1908) 233 Ill. 175, 84 N. E. 178.